

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA

SURESHCHANDRA SOLANKY	)	AB-7152
dba 77 Deli & Food Mart)	
741 Second Street	)	File: 20-315724
Brentwood, CA 94513,	)	Reg: 97040995
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Jeevan S. Ahuja
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	March 4, 1999
	)	Sacramento, CA
)	

Sureshchandra Solanky, doing business as 77 Deli & Food Mart (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his license for appellant and one of his employees selling beer to persons under the age of 21 on two different occasions, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

¹ The decision of the Department, dated June 11, 1998, is set forth in the appendix.

Appearances on appeal include appellant Sureshchandra Solanky, appearing through his counsel, Scott K. Zimmerman, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Peirce.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on February 16, 1996. Thereafter, the Department instituted an accusation against appellant charging that appellant sold beer to an 18-year-old on June 7, 1997, and that appellant's employee, Kishor Kumar (Kumar), sold beer to a 20-year-old on July 11, 1997.

An administrative hearing was held on April 6, 1998. Neither appellant nor his attorney appeared at the Department hearing, although they had received notice of the continued hearing and, in fact, the hearing had been continued at the request of appellant's attorney and the new hearing date cleared with him [RT 3]. The hearing proceeded as a default hearing pursuant to Government Code §11520. Documentary evidence was received and testimony was presented by the two underage purchasers involved and by the police officer and the Department investigator who investigated the sales.

Subsequent to the hearing, the Department issued its decision which determined that the violations had been proven. The ALJ noted, in Finding VII, that the two violations at issue in this appeal made a total of four sale-to-minor violations at the premises within a period of just over eight months.

Appellant thereafter filed a timely notice of appeal and the matter was set for hearing before this Board. Two days before the scheduled hearing date, appellant informed the Board that he had hired new counsel and requested a continuance. In

support of his request, appellant filed a brief arguing that his former counsel had not provided effective representation. The request for continuance was denied, but appellant was given time to file an additional brief, after the filing of which the matter was deemed submitted.

DISCUSSION

After appellant filed his appeal, the Appeals Board requested clarification of the grounds for the appeal. Appellant's former attorney filed a letter contending the evidence established a defense under Business and Professions Code §25660 (reliance on bona fide evidence of age and identity) as to the second sale.

Appellant stated, in the letter from his former attorney, that appellant's employee, Kumar, asked for identification from the minor and believed it to be the minor's identification "because of the resemblance between the picture and [the minor]." In addition, appellant stated, Kumar looked "at the birthdate and thought he saw a birthdate which would make [the minor] over the age of 21." Appellant concluded: "Therefore, evidence does establish that [appellant's] clerk, Mr. Kumar, acted in reliance on bona fide evidence of majority and identity prior to the sale of the alcoholic beverage to [the minor]." (Emphasis in original.)

Since appellant did not appear at the hearing and neither Kumar nor anyone else testified to Kumar's belief about the identification shown, there is no evidence in the record to support the statements appellant made in his letter. In any case, the subjective belief of Kumar as to the bona fides of the identification shown is of consequence only if it was reasonable. The license shown to Kumar by the minor lacked both an expiration date (there was a hole where the date would normally

appear) and the date of birth (part of the year was scratched out) [RT 15, 22]. In addition, neither the ALJ nor the minor thought that the minor resembled the picture on the license, even though the picture was of the minor's brother [RT 16] .

It is not reasonable to accept as “bona fide evidence of majority and identity” a driver's license on which the critical date for determining the holder's age, the birthdate, was not legible. If Kumar relied on the license as evidence of majority, he did not act reasonably in doing so.

Appellant, through his new counsel, now argues that his former counsel was so ineffective that the administrative proceeding at the Department was fundamentally unfair and violative of due process. Therefore, he asks that the Department decision be reversed and the case dismissed or set for re-hearing.

In criminal cases, the right to counsel is guaranteed by the sixth amendment to the U.S. Constitution. The rights of a criminal defendant to appointed counsel if he or she cannot afford one and to the effective assistance of counsel, arise under the sixth amendment right to counsel. Any right to counsel that exists in other cases in California, such as in administrative hearings, arises from the due process clause of the fourteenth amendment to the U.S. Constitution and article 1, section 7, of the California Constitution. Under the Administrative Procedure Act (APA; Gov. Code §§11340-11529), respondents are informed that they may be represented by counsel at their own expense. (Gov. Code §§11505, 11509.)

The situation in California regarding the right to counsel in administrative proceedings is summarized in *California Administrative Hearing Practice, Update June 1996*, §1.7 - Right to Counsel (CEB-California):

“The right to counsel in administrative proceedings differs materially from the right to counsel in criminal proceedings. In *Walker v State Bar* (1989) 49 C3d 1107, 1116, 264 CAL.RPTR. 825, 829, the California Supreme Court, in affirming the general rule that there is no constitutional right to counsel in administrative disciplinary proceedings, noted that the right to counsel has been recognized only when the litigant risks losing his or her physical liberty on losing the litigation. In administrative disciplinary proceedings, the licensee's only due process entitlement is to a 'fair hearing.'

The *Walker* case relies on *White v Board of Medical Quality Assurance* (1982) 128 CA3d 699, 707, 180 CAL.RPTR. 516, 520, in which the court refused to recognize a right to effective counsel in licensee disciplinary proceedings based on due process considerations. . . . Although due process ensures the right to retain counsel in administrative proceedings, there is no right to appointed counsel (for indigent respondents), and no right to effective counsel, as in criminal proceedings.”

The federal immigration cases cited by appellant are inapposite. There the respondents had the right to effective assistance of counsel because they risked deportation, a type of loss of personal physical liberty.

Appellant's argument that he was denied effective assistance of counsel is rejected as a basis for reversing the Department's decision or remanding it for rehearing.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.